No. 80-11

IN THE

Supreme Court of the United States

October Term 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION and BAYLESS, JEROME T. McHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC. J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, and OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Constitution of the United States authorizes Indian tribes to exercise governmental powers of taxation over non-Indians operating on the reservation under the authority of the federal government.

2. Whether attribution of inherent tribal sovereignty to the Jicarilla Apache tribe is consistent with their tribal dependent status and supported by the trial record.

3. Whether the Jicarilla Apache tribe may levy a tax on those previously granted access to the reservation under tribal leases approved by the Secretary of the Interior.

4. If Indian tribes have the power to tax oil and gas produced under leases approved by the Secretary of the Interior, whether that power is preempted on the Executive Order Jicarilla Apache Reservation by 25 U.S.C. § 398c and the total federal regulatory scheme.

5. If Indian tribes have governmental authority to impose taxes on non-Indians, whether constitutional protections apply to prevent the abuse of tribal authority.

6. Whether taxation of production of oil and gas by both the States and Indian tribes unduly burdens interstate commerce.

TABLE OF CONTENTS

		Page
Questions Presented		i
Table of Contents		ii
Table of Authorities		iii
Brief of the Petitioners		1
Opinion Below		2
Jurisdiction		2
Constitutional Provisions, Treaties, Statutes and Executive Orders Involved		2
Statement of the Case		2
Summary of Argument		5
Argument		7
Point IA.	The United States Constitution Does Not Recognize Any Independent Governmental Authority For Indian Tribes	7
Point IB.	Imposition of the Jicarilla Tax Upon Non-Indians Operating on the Reservation Under Federal Authority Is Inconsistent With Tribal Dependent Status	12
Point IIA.	The Leases Approved By The Secretary of the Interior Determine the Terms on Which Petitioners May Remain on the Reservation	22
Point IIB.	The Jicarilla Severance Tax Does Not Meet the Criteria For Tribal Taxation Established in *Colville*	26
Point III.	Congress Has Preempted The Field of Taxation of Oil and Gas On Executive Order Indian Reservations By 25 U.S.C. § 398c And A Total Federal Regulatory Scheme	29
Point IV.	If Indian Tribes Have The Inherent Governmental Power To Impose Taxes On Non-Indians, Non-Indian Citizens Are Entitled To The Benefit of Constitutional Protections Against Abuses Of Tribal Governmental Authority	35
Point V.	The Jicarilla Tax Violates The Commerce Clause	41
Conclusion		46

TABLE OF AUTHORITIES
Cases Cited

	Page
J. D. Adams Mfg. Co., v. *Storen*, 304 U.S. 307 (1938)	45
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Choctaw Nation v. *United States*, 119 U.S. 1 (1886)	15
Cipriano v. *City of Houma*, 395 U.S. 701 (1969)	38
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City of Tulsa v. *Southwestern Bell Telephone*, 5 F.Supp. 822 (N.D. Okla. 1934; aff'd. 75 F.2d 343 (10th Cir. 1935) cert.den. 295 U.S. 744 (1935)	20
Crabtree v. *Madden*, 54 F. 426 (8th Cir. 1893)	24,40
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Groundhog v. *Keeler*, 442 F.2d 674 (10th Cir. 1971)	37
Hanley v. *Kansas City Southern Ry. Co.*, 187 U.S. 617 (1903)	42
Healy v. *James*, 408 U.S. 169 (1972)	40
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	Page
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Japan Line, Ltd. v. *County of Los Angeles,* 441 U.S. 434 (1979)	42
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Matter of Heff, 197 U.S. 488 (1905)	42
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McClanahan v. *Arizona State Tax Comm'n.,* 411 U.S. 164 (1973).	9,37
Mescalero Apache Tribe v. *Jones,* 411 U.S. 145 (1973)	37
Michigan-Wisconsin Pipeline Co. v. *Calvert,* 347 U.S. 157 (1954)	43
Milirrpum v. *Nabalco Pty. Ltd. and Commonwealth of Australia,* [1971-1972] Argus L. R. 65, 122-176 (S.Ct.N. Terr. Australia 1971)	15
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Muskogee National Telephone Co. v. *Hall, 118 F. 382 (8th Cir. 1902)*	20,43
National Bellas Hess, Inc. v. *Department of Revenue,* 386 U.S. 753 (1967)	43
National League of Cities v. *Usery,* 426 U.S. 833 (1976)	9,42
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	Page
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Southern Pacific Transportation Co. v. *Andrus*, Civil No. R-78-0216 BRT (D.Nev. 1980)	19
Southern R. Co. v. *Greene*, 216 U.S. 400 (1910)	40
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United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)	26
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CONSTITUTION, TREATIES AND STATUTES

	Page
United States Constitution:	
ARTICLE I, SECTION 1	2,10
ARTICLE I, SECTION 2, CLAUSE 3	2,10
ARTICLE I, SECTION 8, CLAUSE 3	2,8,43
ARTICLE II, SECTION 1	2,10
ARTICLE III, SECTION 1	2,10
ARTICLE IV, SECTIONS 1, 3 and 4	2,10
ARTICLE V	2,10
ARTICLE VI	2,10
ARTICLE VII	2,10
FIFTH AMENDMENT	2
TENTH AMENDMENT	2,9
FOURTEENTH AMENDMENT	2,8
Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922	2,22,23
Statutes:	
15 U.S.C. § 791, *et seq.*	29
25 U.S.C. § 71 (Act of March 3, 1871, c. 120, § 1, 16 Stat. 566)	2,14,30
25 U.S.C. § 231	10-11,33
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Respondents.

BRIEF OF THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals, reported at 617 F.2d 537 (1980), appears in the Joint Appendix at 139. The Findings of Fact and Conclusions of Law and Judgment of the District Court for the District of New Mexico appear in the Joint Appendix at 127, 135. (hereafter J.A.).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on Feburary 22, 1980. The decision was modified and rehearing denied by the Court of Appeals on April 25, 1980. (J.A. 199). This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND EXECUTIVE ORDERS INVOLVED

This case involves the Constitution of the United States, particularly Articles I-VII and the Fifth, Tenth, and Fourteenth Amendments thereto.[1]

The case also involves the Indian Reorganization Act, 48 Stat. 984, *et seq.,* 25 U.S.C. § 461, *et seq.;* and Act of March 3, 1871, 16 Stat. 566, 25 U.S.C., § 71; the Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922; Executive Orders Relating to the Jicarilla Apache Reservation;[2] and the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398c (quoted in full herein n.39, p. 29, *infra).*

STATEMENT OF THE CASE

The Jicarilla Apache tribe of Indians resides on an Executive Order Reservation lying within the area of New Mexico ceded to the United States by Mexico under the Treaty of Guadalupe Hidalgo. That treaty reserved no sovereign powers to any

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[1] Appendices to Petition for Certiorari (hereafter A.P.C.), at 78-83.

[2] *Id.,* at 84-119

Indian tribe but placed such tribes under the exclusive control of the government of the United States. The Jicarilla Apache tribe is organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*

Petitioners are engaged in the production of oil and gas from tribal lands under valid oil and gas leases issued with the approval of the Tribal Council and the United States Secretary of the Interior. Rentals, royalties, and bonuses are paid to the United States Government, for the benefit of the tribe. The vast majority of these leases were issued prior to the Jicarilla Apache's adoption of their revised constitution in 1968, which first claimed tribal power of taxation over non-Indians. Approximately 80% of the production is shipped interstate for sale outside the State of New Mexico. (J.A. 129).

On July 9, 1976, the Jicarilla Apache Tribal Council adopted an ordinance which purported to levy a severance tax on the production of oil and natural gas "sold or transported off the reservation." (J.A. 38-39).

Petitioners filed suit in the United States District Court for the District of New Mexico under 28 U.S.C. § 1331 alleging that the Jicarilla Apache Tribe lacked authority to tax non-Indians lawfully on their Reservation under federal authority. Petitioners further alleged that if the Court should find the Tribe had any governmental authority to tax non-Indians then the Jicarilla tax violated the Commerce Clause and the Fifth Amendment of the United States Constitution. Finally, Petitioners alleged that if the Tribe had the inherent sovereignty to levy a tax on non-Indians producing oil and gas on the Executive Order Jicarilla Reservation, then that authority was preempted by 25 U.S.C. § 398c.

The District Court entered its Findings of Fact and Conclusions of Law, and Judgment in favor of Petitioners. (J.A. 127, 135). It held that "Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a

severance tax upon oil and gas produced on the Jicarilla Reservation." (*Id.*, 132). After reviewing the legislative history of 25 U.S.C. § 398c, the District Court further found that Congress intended to allow the states and local authorities the exclusive right to tax oil and gas produced on Executive Order Indian reservations. The court also held, that if valid, the Jicarilla severance tax would discriminate against, and, combined with the New Mexico severance taxes, constitute a multiple burden upon, interstate commerce. (*Ibid.*).

A divided Court of Appeals for the Tenth Circuit reversed, holding that even though no treaty or Act of Congress authorizes taxation of non-Indians, the Jicarilla tribe had such power as an attribute of its retained sovereignty. (J.A. 150). It therefore directed entry of judgment in favor of the tribe without considering the sources or attributes of the inherent sovereignty originally held or presently retained by the Jicarilla Apache Tribe or remanding the case for presentation of evidence on this issue. The court found that while the Commerce Clause of the United States Constitution may express the national interest and thereby limit the power of Indian tribes, the Jicarilla severance tax is not in violation thereof. *(Id., 156).* The Court of Appeals did not otherwise address the protection afforded to non-Indians doing business on Indian reservations by the United States Constitution. Finally, the majority held that 25 U.S.C. § 398c was not preemptive of the Jicarilla tax even though it granted the states the express authority to tax oil and gas produced on Executive Order reservations.

Apparently in light of Petitioners' motion for rehearing which pointed out that the Administrative Procedure Act had been amended with regard to sovereign immunity, the court below modified its opinion to hold that since the tribe had the inherent power to tax, any claims that the Secretary of the Interior violated federal law in approving the tax were irrelevant.

SUMMARY OF ARGUMENT

This case presents legal issues of first impression, having far ranging social, political, and economic consequences for both Indians and non-Indians. The question of whether an Indian tribe can tax non-Indians producing oil and gas under leases approved by the Secretary of the Interior has not been decided by this Court. Since Indian reservations contain a significant portion of this country's future energy reserves,[3] it is important for this Court to determine whether the development of this energy "significantly involves the tribes" or is rather a problem national in scope.[4]

The United States Constitution does not recognize any independent governmental authority in Indian tribes.[5] If Indian tribes nonetheless have the inherent power to tax all energy sources on Indian reservations without coordination with, or limitation by, the state or federal governments, it would be inconsistent with their dependent status.[6] The tribal leases herein were executed pursuant to detailed federal regulations as to the remuneration to which the tribe was entitled, at a time when no Indian tribe had ever collected a severance tax.

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[3] As long ago as 1974, Indian oil and gas leases covered a collective acreage of 4,187,644 and produced 30,685,000 barrels of oil and 125,080,000 mcf of gas annually. It is estimated that coal under Indian reservations could provide more than 50 billion tons, or 10% of the nation's future needs, and that uranium reserves located on Indian reservations constitute about two-thirds of all uranium reserves on federal land. In 1974, Indian-held resources accounted for over 15% of the total of all mining on Federal and Indian lands. *Bureau of Competition, Report to the Federal Trade Commission on Mineral Leasing on Indian Lands,* 11, 17, 47 (October 1975).

[4] *Washington* v. *Confederated Tribes of the Colville Reservation,* ..... U.S. ...., 65 L.Ed.2d 10, 28, 100 S.Ct. 2069, 2081 (1980).

[5] *United States* v. *Wheeler,* 435 U.S. 313 (1978); *United States* v. *Kagama,* 118 U.S. 375 (1886).

[6] *Right of the Cherokees to Impose Taxes on Traders,* 1 Op. Atty. Gen. 645 (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs,* (June 3, 1941)

Neither the federal regulations or the leases themselves provide any basis to suggest tribal power to levy taxes after Petitioners' entry onto the reservation. The exclusive federal authority is emphasized by the fact Petitioners are operating on the Jicarilla reservation under the daily supervision of the United States Geolological Survey and Bureau of Indian Affairs.[7] The effort of the tribe to tax conflicts with this federal authority and Congressional intent to prohibit further tribal burdens on these leases as manifest by the language and history of 25 U.S.C. § 398c.

While this Court has dealt with the concept of Indian tribal sovereignty many times, there still exist fundamental unresolved questions of Constitutional law as to the limits which must be placed on the previously enunciated doctrine of tribal sovereignty as it relates to non-Indians operating on reservations under federal licenses. Indian tribes have historically been regarded as unconstrained by Constitutional limitations designed to protect all citizens from the potential abuses of governmental authority.[8] United States citizens cannot, however, be subjected to coercive power by extra-Constitutional tribal governments within the territorial limits of the United States. The restrictions imposed by the Constitution, as well as those flowing from tribal dependent status, are especially significant issues herein as they relate to the criminal sanctions necessary to enforce tribal taxes against non-Indians.[9]

To allow 287[10] independent Indian enclaves within the borders of the existing states to assert sovereignty over non-

[7] 25 C.F.R. Part 171; 30 C.F.R. Part 221; *White Mountain Apache Tribe* v. *Bracker*, ... U.S. ...., 65 L.Ed.2d 665, 100 S.Ct. 2578, (1980).

[8] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978);

[9] *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976).

[10] *Santa Clara, supra*, 436 U.S. 65, n. 21.

Indians would also seriously undermine state jurisdiction and subject the entire federal structure to unnecessary stress.[11] Moreover, tribal governmental power which is completely autonomous within the geographical limits of the reservations would subject non-Indians to potentially coercive governmental authority in a milieu of alien customs, values, and traditions.

ARGUMENT

POINT I

A

THE UNITED STATES CONSTITUTION DOES NOT RECOGNIZE ANY INDEPENDENT GOVERNMENTAL AUTHORITY FOR INDIAN TRIBES

The Court of Appeals below held that the Jicarilla Apache tribe had governmental authority to tax non-Indians without benefit of any treaty or statutory authority. (J.A. 150-51). This holding is grounded on that court's interpretation of the confused and often contradictory concept of "inherent sovereignty." It is necessary at the outset to examine the origin, nature, and extent of the "sovereignty" of the Jicarilla Apache tribe, since "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are upon the soundest principles, exempt from taxation." *Curry* v. *McCanless,* 307 U.S. 357, 366 (1939). Inasmuch as the character of all governmental powers of sovereignty in this country is structured and limited by the United States Constitution, *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 388 (1789), it would appear appropriate to examine this venerable

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[11] If tribes are allowed independent governmental jurisdiction, they are free to ignore totally all state police power restrictions in areas such as liquor and gambling. *See, e.g., United States* v. *New Mexico,* 590 F.2d 323 (10th Cir. 1978), cert. den. 444 U.S. 832 (1979), prohibiting enforcement of state liquor laws on an Indian reservation; *Seminole Tribe* v. *Butterworth,* 491 F.Supp. 1015 (S.D.Fla. 1980), prohibiting enforcement of state gambling restrictions on Indian reservations.

document to determine what governmental authority is contemplated for Indian tribes.

"Indian tribes" are mentioned only once in the United States Constitution. Article I, § 8, Clause 3 provides that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes."[12] The Court below stretched this limited reference to Congressional power over Indian tribes in the Commerce Clause into a recognition of tribal governmental sovereignty. The majority implicitly, and Judge McKay's concurrence explicitly, assumed that by mentioning "Indian tribes" in the Commerce Clause of the Constitution, the founding fathers intended the tribes to assume general governmental authority within the territorial boundaries of their reservations. (J.A. 162).

This Court, however, long ago rejected any such interpretation of the Constitution. In *United States* v. *Kagama,* 118 U.S. 375 (1886), it concluded there is no legitimate governmental sovereignty for Indian tribes within the federal framework. In a passage recently quoted with approval in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978), this Court said:

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States or of the States of the Union. *There exist in the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these. *United States* v. *Kagama,* 118 U.S. 375, 379 (1886). (emphasis in original).

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[12] "Indians not taxed" are recognized in two less relevant provisions relating to the determination of state representation in the House of Representatives and state apportionment of direct taxes. United States Constitution, Article I, § 2, Clause 3 and the Fourteenth Amendment, § 2.

Indeed, this Court recognized the difficulties of integrating tribal sovereignty into the dual Federal-State system created by the Constitution very recently in *White Mountain Apache Tribe* v. *Bracker,* ... U.S. ..., 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980). Again recognizing the continuing validity of *Kagama*, Justice Marshall said at 65 L.Ed.2d. 672, 100 S. Ct. 2583:

> The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886).

Any recognition of general governmental authority in Indian tribes directly contradicts the Tenth Amendment which expressly reserves to the states or the people all sovereign governmental power not directly delegated to the federal government. *New York* v. *Dibble*, 62 U.S. (21 How.) 366, 368-70 (1859); *cf., National League of Cities* v. *Usery,* 426 U.S. 833 (1976). Since all constitutionally mandated governmental power is divided among the United States, the States, and the people, recognition of Indian tribes as possessing inherent governmental authority not derived from one of these sources clearly violates the Constitution.

Rather than contemplating a role for Indian tribes as governmental sovereigns, then, it is clear the Constitution does not recognize Indian tribes as governmental entities within the federal system.[13] To read a recognition of general governmental

[13] Several legal commentators have examined the relationship between "tribal sovereignty" and the United States Constitution extensively and reached this conclusion. *See, e.g.,* Martone, *American Indian*

authority for Indian tribes into the Constitution, as the Court of Appeals did, is not justified by that document's language or historical context.[14] It also directly contravenes the entire system of divided federal-state authority established therein.[15]

The Constitution's denial of a governmental role for Indian tribes within the federal system is particularly significant in the present context. The Constitution, and especially the Tenth Amendment, has long played a vital role in mediating the respective powers of the state and federal governments in the area of taxation. It establishes a system where neither federal nor state government has the power to cripple or destroy the other through taxation.[16] In the instant case, however, the tribal severance taxes will inevitably restrict the ability of New Mexico and other states to obtain tax revenue from oil and gas produced on the mineral-rich Indian reservations within their boundaries. Under the Court of Appeals' decision, the states are expected to perform certain governmental duties on the reservation[17] but the tribes become sovereign over not only their own

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Tribal Self-Government in the Federal System: Inherent Right or Constitutional License, 51 Notre Dame Lawyer 600 (1976); Mettler, *A Unified Theory of Indian Tribal Sovereignty,* 30 Hastings L.J. 89 (1978); Note, *Sovereignty, Citizenship and the Indian,* 15 Ariz.L.R. 973 (1973).

[14] A review of contemporaneous historical documents indicates the draftsmen of the Constitution never contemplated a governmental authority for Indian tribes. *The Federalist* No. 7 at 37, No. 24 at 156-7, No. 25 at 161, No. 42 at 282 (Wesleyan U. Ed. 1961). The general tenor of these comments is that Indian tribes were potentially dangerous aliens to be isolated from American society. Such territorial isolation is no longer possible since all the present Indian reservations are now within the boundaries of the States of the Union.

[15] Article I, §1; Article II, §1; Article III, §1; Article IV; Article V; Article VI; Article VII.

[16] *Lane County* v. *Oregon,* 74 U.S. (7Wall.) 71, 76-7 (1869); *In re Kentucky Fuel Gas Corporation,* 127 F.2d 657 (6th Cir. 1942) appeal dism'd, 317 U.S. 593 (1943).

[17] There is no dispute the Jicarilla Tribe has availed itself of state highways, police, game, and agricultural services and other state

people but all non-Indians within their borders, and in a broader sense, over the States.

The Constitution grants to the Congress the primary authority to regulate commerce with the Indian tribes so that the states would not inadvertently infringe on tribal customs and create unnecessary hostilities between Indian and non-Indian cultures.[18] To allow extra-constitutional tribal taxation of mineral resources, already heavily taxed by the states, would create the very tribal-state hostility the Constitution was designed to prevent.[19]

Dissenting from the majority below, Chief Judge Seth noted that the United States and the states are the only two governmental entities contemplated by the Constitution. To allow Indian tribes sovereignty within the territorial boundaries of a state, but not subject to state control, is inconsistent with the federal concept:

> The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities, and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. (J.A. 169) (emphasis in original).

To grant Indian tribes the sovereignty over non-Indians urged by the majority of the Court of Appeals would be to elevate them to a level equal to or greater than States of the Union. In his concurring opinion, Judge McKay, equating

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functions. (R. 263-67; 272-4; Defs. Ex. T-1, Ex. T-2, R. 289-90). Indeed, the Congress has authorized the states to provide many governmental services on the reservations. *See, e.g.*, 25 U.S.C. §§ 231, 311, 452.

[18] The Federalist No. 3 at 16-17 (Wesleyan U. Ed. 1961).

[19] Compare *United States* v. *Blackfeet Tribe of Blackfeet Ind. Res.*, 369 F.Supp. 562 (D.Mont. 1973) with *Seminole Tribe* v. *Butterworth*, 491 F.Supp. 1015 (S.D. Fla. 1980).

tribes with federal municipalities, expressly recognized the implications of the majority position in attributing "police powers, regulatory powers, or fiscal powers" to Indian tribes. (J.A. 164). The states would have absolutely no control over the exercise of governmental authority on those Indian enclaves existing within their borders.

The policy purposes underlying the doctrine of "tribal sovereignty," including *inter alia* the preservation and development of tribal customs and religion, may be fully achieved without subjecting other Americans to tribal jurisdiction. Our federal system was not designed to, and cannot, accommodate governmental authority by an entity not recognized by the Constitution.

POINT I
B
IMPOSITION OF THE JICARILLA TAX UPON NON-INDIANS OPERATING ON THE RESERVATION UNDER FEDERAL AUTHORITY IS INCONSISTENT WITH TRIBAL DEPENDENT STATUS

Since Indian tribes cannot be recognized as having governmental powers outside of, and in conflict with, the system of dual sovereignty created by the Constitution, it is important to determine the nature of sovereignty possessed by them. In *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), Chief Justice Marshall first used the phrase "domestic dependent nations" which has frequently been employed since to characterize the role of Indian tribes within the governmental structure of the United States. In defining a "domestic dependent nation", Chief Justice Marshall specifically recognized tribal government was totally dependent upon the federal government. 30 U.S. (5 Pet.) at 17.

In his concurring opinion in *Cherokee Nation*, Justice Johnson also made it clear that he did not perceive the Court's decision as recognizing "Indian sovereignty" to allow general governmental authority over non-Indians.[20] Justice Johnson then noted that even if they were to be given limited powers of self-government over internal tribal matters, Indian tribes could not be recognized as general governmental entities. 30 U.S. (5 Pet.) at 26.

Justice Baldwin in his concurrence in *Cherokee Nation*, noted that even at that early date it had long been settled that Indian tribes retained no independent inherent sovereignty but were vested with only such rights as were recognized by the federal government:

> In the case of *Johnson* v. *M'Intosh,* 8 Wheaton 543, 571, the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the States, the confederacy and this Union, their tenure was the same occupancy, *their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government,* subject only to such rights; that grants vested soil and dominion and the powers of government, whether the land granted was vacant or occupied by Indians . . . *They are not named or referred to in any part of the opinion of the court as nations or States, and nowhere declared to have any national capacity or attributes of sovereignty in their relations to*

[20] Justice Johnson pointed out that such tribal governmental sovereignty would be completely inconsistent with existing state, as well as federal, powers:

> It is clear that it was intended to give them [Indian tribes] no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with *the unquestioned rights of the states or United States, over the territory within their limits.* 30 U.S. (5 Pet.) at 23. (emphasis added).

> *the general or State governments.* 30 U.S. (5 Pet.) at 48-49. (emphasis added).

Justice Baldwin further recognized that since the Indians had no "inherent" rights of sovereignty, the courts could not create such rights merely by judicial fiat:

> [T]he judicial power cannot devest the States of rights of sovereignty and transfer them to the Indians by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for over fifty-five years; and force, by mere judicial power, upon the other departments of this government and the States of this Union, the recognition of the existence of nations and states, within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. 30 U.S. (5 Pet.) at 49-50.

Subsequent to *Cherokee Nation,* this Court consistently continued to recognize the limitations inherent in tribal "sovereignty." In *United States* v. *Kagama,* 118 U.S. 375 (1886), for example, this Court recognized that in 1871 Congress withdrew any legal foundation for further attribution of governmental sovereignty to Indian tribes. In that year, Congress had passed a statute prohibiting acknowledgement or recognition of any Indian tribe as an independent nation or power capable of contracting with the United States by treaty.[21] In interpreting this Act, the Court recognized that Indian tribes no longer had sovereignty in the sense of independent governmental power, but were completely "dependent for their political rights" on the government of the United States. 118 U.S. at 384.

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[21] This statute, the Act of March 3, 1871, c. 120 § 3, 16 Stat. 570 is presently codified as 25 U.S.C. § 71.

In *Choctaw Nation* v. *United States,* 119 U.S. 1 (1886), the Court again emphasized that Indian tribes did not possess governmental authority. The Court therein compared Indian tribes to the federal and state governments in the following fashion:

> The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. *On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe.* 119 U.S. at 27 (emphasis added).

This Court's more recent decisions have likewise recognized that Indian tribes are proscribed from exercising those governmental powers terminated by Congress, as well as those inconsistent with their dependent status.[22] *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), clearly enunciated and applied the limitations implicit in tribal dependent status. In reversing a Ninth Circuit decision upholding tribal criminal jurisdiction over non-Indians, this Court pointed out that it could not find any legal source for such tribal jurisdiction. In reaching this conclusion, Mr. Justice Rehnquist, writing for the majority, considered various Indian treaties, opinions of the United

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[22] The historical line of precedent illustrating this Court's recognition of the limitations inherent in tribal dependent status also includes *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810); *Johnson and Graham's Lessee* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543, 574 (1823); *United States* v. *Rogers,* 45 U.S. (4 How.) 567 (1846); *United States* v. *McBratney,* 104 U.S. (14 Ott), 621 (1881); *Ward* v. *Race Horse,* 163 U.S. 504 (1896); *Montoya* v. *United States,* 180 U.S. 261 (1901); *United States* v. *Quiver,* 241 U.S. 602 (1916); *People* v. *Martin,* 326 U.S. 496 (1946); *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962); *Kennerly* v. *District Court,* 400 U.S. 423 (1971). The divestiture of Indian tribal sovereignty in favor of the United States, under its Constitution and framework of Anglo-Saxon common law, accords with the views of the courts throughout the common law nations. *Cf., Milirrpum v. Nabalco Pty. Ltd. and Commonwealth of Australia,* [1972-1973] Argus L.R. 65, 122-176 (S. Ct. N. Terr. Australia 1971).

States Attorney General and the history of congressional action and inaction. In attempting to determine the historical understanding of the Congress, for example, Justice Rehnquist quoted from a 1960 Senate Report recommending enactment of a bill prohibiting unauthorized entry upon Indian land:

> Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep non-members off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.* 435 U.S. at 205. (emphasis in original).

More specifically the *Oliphant* holding recognized the limits on tribal power:

> . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers; *'inconsistent with their status.'* 435 U.S. at 208. (emphasis in original).

In *Oliphant,* then, this Court clearly rejected the assertion that Indian tribes may exercise all governmental powers except those expressly withdrawn by Congress, and held instead that Indian tribes were also without those powers inconsistent with their dependent status.

In *United States* v. *Wheeler,* 435 U.S. 313 (1978), the Court recognized that a divesture of tribal sovereignty occurs generally in tribal relations with non-Indian society:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. 435 U.S. at 326.

Justice Stewart then explained the difference between a tribe exercising potentially coercive jurisdiction over a non-Indian and possessing such jurisdiction over internal tribal relations:

> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. *But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. 435 U.S. at 326. (emphasis added).

It is important, therefore, to examine whether the Jicarilla's attempt to tax non-Indians operating on the reservation under the authority of a lease, sanctioned and approved by the Secretary of the Interior, would be inconsistent with their dependent status. It is significant that in determining the extent to which a specific power is inconsistent with tribal dependent status this Court has considered the operating assumptions of the Executive and Legislative Branches, as well as those of the lower federal courts. *Oliphant, supra,* 435 U.S. at 203. Legal officers within the Executive Department have frequently pointed out sovereignty of Indian tribes is dependent upon and completely subordinate to that of the United States.[21]

The Attorney General and Solicitor of the Department of the Interior have specifically recognized that Indian tribes do not have the power to tax non-Indians operating on Indian reservations with federal permission. The first United States Attorney General to consider the problem advised that to allow Indian tribes to tax non-Indians rightfully engaged in commerce on the reservation under a federal license would be inconsistent with tribal dependent status. In *Right of the Cherokees to Impose Taxes on Traders,* 1 Op. Atty. Gen. 645 (1824), Attorney General Cushing noted the potential for abuse in allowing Indian tribes to

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[21] *See, e.g., Jurisdiction of Courts of the Choctaw Nation,* 7 Op. Atty. Gen. 174, 178 (1855); *Regulation of Traders on the Navajo Reservation,* 60 I.D. 176 (1948).

tax non-members as well as the conflict with Congressional authority inherent in taxation of federal licensees:

> Again: *if the Cherokee nation have the right to tax at all, the quantum of the tax rests in their own discretion.* If they have a right to impose a tax of $50, they have the same right to impose a tax of $500, $5,000, or $50,000: *If they may tax for revenue, they may tax for exclusion. If they have a right to superadd, at pleasure, a new burden on a regulation of trade ordained by Congress, they may impose such a burden as to defeat the regulation altogether.* In the case of McCullogh against the State of Maryland, the Supreme Court of the United States decided, that although the State of Maryland was a sovereign and independent State, and consequently possessed the general power of taxation, yet they had no right to tax an institution which the constitution had given Congress the power to create; *because a power to tax was a power to destroy, and was utterly inconsistent with the paramount power of Congress to create. The question which we are considering appears to me to turn on the same principle.* 1 Op. Atty. Gen. at 650 (emphasis added).[21]

More recently, the Solicitor of the United States Department of the Interior advised the Commissioner of Indian Affairs that when the Federal Power Commission has granted a license for the establishment of powerlines across an Indian reservation

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[21] In concluding tribal taxation would conflict with a preexisting federal license, the Attorney General considered how such tribal taxation power would contravene tribal dependent status:

> . . . *and what is a tax upon persons authorized by Congress to trade without it, but a new and distinct regulation superinduced upon the regulations provided by Congress:* So that the principle affirmed by this tax is, not that the trade shall stop, but that it shall continue; and that it shall continue subject to such regulations as the Cherokees may make, although by their treaties they declare that the sole and exclusive power of making such regulations shall be in Congress; or, in other words, that Congress alone shall regulate this trade, but that the Indians shall regulate it also: which appears to me to be a political solecism.
>
> *Upon the whole, I am of the opinion that the Indians have no right to impose this tax on traders licensed under the authority of the United States.* 1 Op. Atty. Gen. at 653. (emphasis added).

with express tribal authorization, the tribe has no power to tax the operation of those lines. *Memorandum of the Solicitor to the Commissioner of Indian Affairs* (June 3, 1941). The Solicitor concluded:

> While it is true, as stated in the proposed letter, that the Solicitor's opinion of October 25, 1934 (55 I.D. 14), defined the taxing power as "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe," that opinion also held that the powers vested in an Indian tribe under Section 16 of the Indian Reorganization Act were those powers of sovereignty not modified or abrogated by Congress. Congress has placed the control of power transmission lines crossing Indian reservations in the Federal Power Commission, subject only to the consent of an organized tribe to the disposition of the land and the amount of the annual charge. *When the tribe has consented, it has no power to control or interfere with the operation of the lines nor to impose additional burdens.* (Memorandum, p. 2) (emphasis added).

In the instant case, the Jicarillas have clearly consented to the leases involved and they therefore have "no power . . . to impose additional burdens." Petitioners who executed leases with the Jicarilla tribe on federal lease forms, with the express approval of the Secretary of the Interior, and totally subject to his supervision, are no less federal licensees than the power company referred to by the Solicitor.

The lower federal courts have also frequently recognized that Indian tribes do not have general governmental sovereignty and are allowed to control even their internal affairs only to the extent permitted by Congress.[25] Moreover, the wardship status

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[25] *United States* v. *Consolidated Wounded Knee Cases,* 389 F.Supp. 235 (D.Neb; D.S.D. 1975) aff'd in part and rev'd other grds. 538 F.2d 770 (8th Cir. 1976) *cert. den.,* 429 U.S. 1099 *reh. den.* 431 U.S. 909 (1977); *Trans-Canada Enterprises Ltd.* v. *Muckleshoot Indian Tribes,* Civil No. C-77-882 M (W.D. Wash. 1978); *Southern Pacific Transportation Co.* v. *Andrus,* Civil No. R-78-0216 BRT (D.Nev. 1980).

of Indian tribes is itself a recognition[26] that whatever governmental sovereignty is possessed by Indian tribes is inferior to, and may not conflict with or infringe upon, the national interests of the federal government. The Courts have also expressly recognized that Indian tribes may not impose additional burdens on businesses operating on the reservation under federal authority. *Musgokee National Telephone Co.* v. *Hall,* 118 F. 382 (8th Cir. 1902); *cf., City of Tulsa* v. *Southwestern Bell Telephone,* 5 F.Supp. 822 (N.D.Okla. 1934) *aff'd* 75 F2d 343 (10th Cir. 1935), *cert. den.* 295 U.S. 744 (1935). Tribal efforts to engage in business relations with non-Indians without federal supervision and approval have also consistently been invalidated.[27]

These lower court decisions are consistent with this Court's recognition that tribal action cannot lawfully interfere with vested property interests sanctioned by the federal government. In *Cherokee Nation* v. *Kansas Railway Co.,* 135 U.S. 641 (1890), the Court held that the Cherokee tribe did not retain the authority to prohibit access to their reservation to federal lessees. In that case, Congress had granted the Kansas Railway Company a right-of-way through the Cherokee Reservation. The Cherokees sought an injunction to prevent the Railway Company from entering the Reservation for the purpose of constructing a railroad. This Court resoundingly rejected the tribal contention that "all of such territory remains under the jurisdiction and sovereignty of the plaintiff" tribe (135 U.S. at 649). In holding the Cherokee tribe did not possess the power of eminent domain, the Court said:

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[26] With regard to the implications of wardship status upon tribal sovereignty, see, *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977); *Board of County Commissioners* v. *Seber,* 318 U.S. 705, *reh. den.* 319 U.S. 782 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286 (1911).

[27] *See, e.g., United States* v. *Candelaria,* 271 U.S. 432 (1926) (conveyance); *Laurence* v. *United States,* 381 F.2d 989 (9th Cir. 1967) (lease); *United States* v. *Emmons,* 351 F.2d 603 (9th Cir. 1965) (lease); *Leaf* v. *Udall,* 235 F.Supp. 366 (N.D.Cal. 1964) (contract for legal services).

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. 135 U.S. at 653.

Territory cannot, therefore, be the talisman of tribal sovereignty since such unidimensional analysis is ultimately inconsistent with the "domestic dependent" status of Indian tribes. A functional analysis of available authorities demonstrates retained tribal sovereignty, in the sense of creating affirmative governmental authority, exists only in a matrix of three distinct factors: territory, membership, and subject matter.[28] The coalescence of all three of these factors is necessary before tribal sovereignty can achieve its legitimate objective — the preservation of intra-tribal self-government — without infringing upon the superior sovereignty of the United States and its constituent states. No single factor in this matrix standing alone warrants the exercise of affirmative tribal jurisdiction. Just as the tribe may not exercise jurisdiction beyond the confines of the reservation or upon a subject matter precluded or pre-empted by Congress, so mere presence upon the reservation of non-Indians should not be sufficient to warrant the imposition of tribal governmental authority upon them.

The legitimate objectives of federal Indian policy, including the encouragement and protection of tribal "self-government," may be fully and effectively obtained without the indulgence of tribal territorial autonomy at the expense of the countervailing rights of other Americans. The policy purposes underlying the

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[28] Tribal sovereignty as an independent and affirmative source of power has properly been recognized as "pure legal fiction." Oliver, *The Legal Status of American Indian Tribes*, 38 Ore.L.R. 193, 230 (1959).

doctrine of "tribal sovereignty," directed toward the preservation and development of tribal customs, religions, traditions, and self-determination, may be fully achieved within the above matrix without sacrificing the legitimate interests of other Americans. Moreover, under this analysis affirmative application of tribal jurisdiction is distinguished from the defensive use of tribal "sovereignty," which may be employed to resist improper encroachment by the States.

Taxation of non-Indians by Indian tribes based on inherent sovereignty violates the federalism created by the United States Constitution and, as applied to tribal lessees under leases approved by the Secretary of the Interior, violates tribal dependent status.

POINT II

A

THE LEASES APPROVED BY THE SECRETARY OF THE INTERIOR DETERMINE THE TERMS ON WHICH PETITIONERS MAY REMAIN ON THE RESERVATION.

There can be little question the Jicarilla Apache tribe, with the express approval of the Secretary of the Interior, can determine who may enter the Reservation and on what terms. Linking the source of tribal authority to tax non-members to the proprietary power to exclude is particularly appropriate in the case of a tribe such as the Jicarilla Apaches. Unlike many Indian tribes, the Jicarillas were not an organized and existing independent sovereign at the time the Constitution was signed.[29] When the United States acquired the New Mexico territory from Mexico under the 1848 Treaty of Guadalupe Hidalgo, there was no existing central Jicarilla tribal authority in the

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[29] As Chief Judge Seth pointed out in his dissent below, the Jicarillas totally lacked any central authority and merely banded together for purposes of military defense or aggression. (J.A. 167).

governmental sense. (J.A. 167) Article XI of the Treaty of Guadalupe Hidalgo recognized that the territory acquired by the United States was occupied in part by Indian tribes, "who will hereafter be under the exclusive control of the government of the United States." (A.P.C. 102).

The historical limitations on Jicarilla sovereignty, articulated so cogently in Judge Seth's dissent below, are consistent with this Court's construction of the effect of the Treaty of Guadalupe Hidalgo in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States,* 136 U.S. 1 (1890). In *Latter-Day Saints,* this Court found that from the moment it acquired lands from Mexico under the Treaty of Guadalupe Hidalgo, the United States was the only sovereign in the territory and all legitimate governmental power claimed thereafter must be directly traced to that source:

> Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. 136 U.S. at 42-3.

It is clear that the Court in *Latter-Day Saints* intended this rule to apply to tribal "governments" since only four years prior to the rule as enunciated in *Latter-Day Saints,* the Court had decided *United States* v. *Kagama,* 118 U.S. 375 (1886), discussed *supra,* at page 14; *cf., United States* v. *Blackfeet Tribe of Blackfeet Ind. Res.,* 369 F. Supp. 562 (D. Mont. 1973).

Petitioners submit the Court of Appeals below confused the proprietary right of an Indian tribe to condition entry onto the reservation, with the sovereignty of the United States government. This is obvious in the majority's reference to the power to exclude or condition entry, a right retained by every property owner, as a "sovereign power." (J.A. 150). In discussing the origins of tribal sovereignty, the Court of Appeals purported to

find a "commonly shared presumption of Congress, the Executive Branch, and the lower federal courts . . . . that the tribes retained the power to levy a tax that falls upon non-members doing business on the reservation."[30] As the earliest pronouncement of the Executive Branch cited by the Court of Appeals indicates, however, such tribal power derives directly from tribal property rights. In *Choctaw and Chicasaw Permit Laws,* 18 Op. Att'y Gen. 34 (1884), Attorney General Phillips made it clear Tribal "taxation" powers were proprietary in origin and applied "only to persons indifferent to the United States,"[31] not those legally on the reservation with federal authority.

The decisions of the "lower federal courts" relied upon by the Tenth Circuit also grounded tribal powers of taxation on the power to exclude non-members and to levy a fee as a condition precedent to their entry.[32] The "sovereignty" which allowed the Creek tribe to impose a legal permit "tax" on non-members was recognized as deriving from the Indian's power to limit entry onto their reservation in *Maxey* v. *Wright,* 54 S.W. 807

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[30](J.A. 149-50). The District Court found and concluded, based on the record, "Whatever sovereignty the Jicarilla Apache tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation. (J.A. 132). The Court of Appeals erroneously substituted its own findings and conclusions regarding inherent sovereignty without, at the least, remanding to the trial court for evidence on the attribution to the Jicarilla tribe of sovereignty to impose taxation.

[31] 18 Op. Atty. Gen. 34, 37.

[32](J.A. 150). See, *Buster* v. *Wright,* 135 Fed. 947, 949 (8th Cir. 1905), appeal dism'd, 203 U.S. 599 (1906); *Crabtree* v. *Madden,* 54 Fed. 426, 431-2 (8th Cir. 1893). In *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956), the district court, which was affirmed by the 8th Circuit, described the tribal tax as one levied "for the privilege of doing business on reservation land." 129 F. Supp. 15, 24 (D.S.D. 1955). The same tax was considered again in *Barta* v. *Oglala Sioux Tribe of Pine Ridge Res.*, 259 F.2d 553 (8th Cir. 1958), *cert. den.* 358 U.S. 932 (1959), wherein the court held the United States Constitution did not apply to tribal taxation.

(Ct.App.Ind.T. 1900), aff'd 105 Fed. 1003 (8th Cir. 1900). The Court of Appeals for the Indian Territory therein quoted directly from the 1884 Opinion of Attorney General Phillips, *supra,* saying:

> In absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own rights of occupancy, and to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States, and levy a pecuniary exaction therefor . . . I submit that, whatever this may mean, it does not limit the right of these tribes to pass upon the question, who (of persons indifferent to the United States, *i.e.* neither employes, nor objectionable) shall share their occupancy, and upon what terms. That is a question which all private persons are allowed to decide for themselves; and even wild animals, not men, have a certain respect paid to the instinct which in this respect they share with man. The serious words 'jurisdiction' and 'self-government' are scarcely appropriate to the right of a hotel keeper to prescribe rules and charges for persons who become his fellow occupants. 54 S.W. at 809.

In the present case, however, the Jicarilla Apache tribe has already made that determination. Over the last three decades, Petitioners have executed numerous oil and gas leases with the Jicarilla Apache tribe. Several Petitioners paid substantial bonuses for such leases, and all Petitioners have paid substantial rental and royalty fees to the United States Geological Survey for the benefit of the tribe.[33]

In the instant case, Petitioners entered long-term oil and gas leases with the Jicarilla Apache Tribe at a time when no American Indian tribe had ever attempted to enforce a severance tax against non-Indian mineral lessees. Moreover, when the vast majority of these leases were executed, the Jicarilla Apache Tribal Constitution did not even purport to grant the tribal

[33] R. 71-2; Pl. Ex. 1, R. 88.

council any authority to levy taxes against non-Indians. Only after Petitioners had invested substantial sums of money developing the leases and paid the Jicarilla Apache Tribe considerable sums as rentals and bonuses, did the tribe amend its Constitution purportedly to allow the severance taxes at issue. If a tribe can impose upon the holder of a federal lease a condition not included or provided for in the written instrument, and then exclude the holder from Indian lands for failure to comply with that condition, then the possessory interest can be made a practical nullity by the unilateral action of the tribe.[34] No proprietary power can justify such a result.

POINT II

B

THE JICARILLA SEVERANCE TAX DOES NOT MEET THE CRITERIA FOR TRIBAL TAXATION ESTABLISHED IN *COLVILLE*

Since this Court recently considered the power of a tribe to tax non-Indians entering the reservation to purchase cigarettes, an analysis of *State of Washington* v. *Confederated Tribes of the Colville Indian Reservation,* . . . . U.S. . . . . , 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980) appears appropriate. In *Colville* this Court held, *inter alia,* that an Indian tribe may impose a tribal tax on cigarettes sold on the reservation. Similarly, the majority in *Colville* acknowledged the tribal power to tax involved "non-Indians *entering* the reservation to engage in economic activity." . . . . U.S. . . . . , 65 L.Ed.2d at 29, 100 S.Ct. at 2081. (emphasis added). In *Colville,* however, the majority specifically recognized that even non-Indians living on the reservation could "travel

[34] Both paragraph 3(g) of the typical lease (J.A. 27) and 25 CFR § 171.28 prohibit any regulation which would operate to affect the term of the lease or rate of royalty. Even if the tribe had legitimate governmental authority, it could not abrogate such contractual obligations. *People of Puerto Rico* v. *Russell & Co.,* 315 U.S. 610, reh. den. 316 U.S. 708 (1942); *cf., United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 26 (1977).

elsewhere" to purchase their cigarettes, if they wished to avoid the tribal tax. .... U.S. ...., 65 L.Ed.2d at 32, 100 S.Ct. at 2083. The non-Indian thus had no vested property right in purchasing tribal cigarettes. No doubt because of the lack of potential for compulsive coercive enforcement of their taxes by the tribes in *Colville,* this Court did not find an overriding federal interest which would be frustrated by the tribal taxes. .... U.S. ...., 65 L.Ed.2d at 29, 100 S.Ct. at 2081. The Court also expressly recognized that the relevant treaties involved could "be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. . ." .... U.S. ...., 65 L.Ed.2d at 31, 100 S.Ct. at 2082. It thus appears that at base, the Court upheld the tribal power to add its tax to the sale of cigarettes because the tribe could exclude non-Indians wishing to enter the reservation to purchase cigarettes, and the non-Indians could choose whether to enter the reservation and purchase cigarettes with knowledge in advance of the tribal tax.

But what of non-members, like Petitioners, whose conditions with respect to entry onto the reservation have already been met and whose expenditures under their federally sanctioned leases are such that they cannot possibly be asked to "travel elsewhere"? *Colville,* .... U.S. ...., 65 L.Ed.2d at 32, 100 S.Ct. at 2083. Petitioners did not agree to pay the tax nor can they be excluded from their leaseholds and easements which set forth the only conditions imposed by the United States and the Tribe for their initial entry. The application of the tribal taxes in *Colville* to non-Indians who voluntarily entered the reservation as tribal invitees with knowledge of the tax is therefore dramatically different than the application of the Jicarilla severance tax to Petitioners.

Even if the factual situation in *Colville* were analogous, the Jicarilla tax does not meet the *Colville* criteria for tribal taxation of non-Indians. Justice White recognized that tribal powers

of taxation, even respecting otherwise valid tribal interests, may be divested by overriding national interests as well as by federal law and necessary implication of their dependent status. .... U.S. ...., 65 L.Ed.2d at 28, 100 S.Ct. at 2081.

The dependent status of the Jicarilla Apaches does not allow them to impose additional financial and administrative burdens upon lessees operating under federally approved and regulated leases. The Jicarillas are also divested by federal law of their power to impose severance taxes on oil and gas severed from their Executive Order Reservation. (*See,* Point III, *infra*). Moreover, the Jicarillas do not have the requisite "significant interest" to tax oil and gas production under what are essentially federal leases.[35] Not only is energy production a national, rather than a tribal interest, it is the federal government which holds actual legal title to the oil and gas.[36]

Even if the tribe had an otherwise significant interest in the leases,[37] the taxation and regulation of oil and gas production is not a matter which merely involves the tribe or its members. It is rather a matter of national public interest. Indian mineral taxes will inevitably either cause further increases in the cost of

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[35] Indian title to reservation land is recognized to be only a right of occupancy completely extinguishable at will by the fee owner, the federal government. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974)

[36] The Jicarilla Reservation was created by Executive Order rather than a treaty ratified by Congress. (J.A. 142.) Whatever tribal interest exists in Executive Order Reservations may be completely terminated by either the President or Congress without payment of any compensation to the tribe. *Sioux Tribe* v. *United States,* 316 U.S. 317 (1942); *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86 (1949); *cf., United States* v. *Sioux Nation of Indians,* .... U.S. ...., 65 L.Ed.2d 844, 875, n. 29, 100 S.Ct. 2716, 2740 (1980); 25 C.F.R. § 171.2.

[37] Tribal economies have not traditionally been based on mineral production. Allen, *State Conservation of Oil and Gas,* 5 Rocky Mt. Min. L.I., 59, 70 (1960); Hearings before Subcommittee of the Committee on Indian Affairs on H.R. 9133, 69 Cong. 1st Sess., pp. 8-17 (February 19, 1926).

energy to consumers, or discourage production from marginal wells on Indian lands, or both. This would be contrary to the two national goals of increasing domestic energy supply and limiting further price increases for domestic energy.[38]

POINT III

CONGRESS HAS PREEMPTED THE FIELD OF TAXATION OF OIL AND GAS ON EXECUTIVE ORDER INDIAN RESERVATIONS BY 25 U.S.C. § 398c AND A TOTAL FEDERAL REGULATORY SCHEME

The right of tribal self-government is ultimately dependent upon, and subject to, the broad power of Congress. *White Mountain Apache Tribe* v. *Bracker,* .... U.S. ...., 65 L.Ed.2d 665, 672, 100 S.Ct. 2578, 2583 (1980); *Colville, supra,* .... U.S. ...., 65 L.Ed.2d 10, 29-34, 100 S.Ct. 2069, 2081-5 (1980). Congress has expressed its intent to preempt any tribal taxation power possessed by the Jicarillas in 25 U.S.C. § 398c.[39]

No treaties were ever made by the Jicarilla Apache tribe, and by the provisions of 25 U.S.C. § 71, Congress determined that as of 1871 Indian tribes were no longer to be regarded as independent sovereigns. Thereafter, as this Court stated, "the

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[38] *See, e.g., Energy Policy and Conservation Act,* 42 U.S.C. § 6201, *et seq.; Energy Supply and Environmental Coordination Act,* 15 U.S.C. § 791 *et seq.*

[39] 25 U.S.C. § 398c, reads in full:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive Order Indian Reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

Government began to regulate their affairs through statute or through contractual agreements ratified by statute." *DeCoteau* v. *District County Court,* 420 U.S. 425, 432 (1975), *reh. den.* 421 U.S. 939 (1975); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 72 (1962). Since no Jicarilla treaty had been ratified prior to 1871, when Congress terminated recognition of the remaining recalcitrant Indian bands, the Jicarilla Reservation was created by Executive Order.[40] In light of the purposes of 25 U.S.C. § 71 and the marked change in attitude it represented, Congress adopted a somewhat hostile attitude toward reservations created exclusively by the President after 1871. It is from this historical perspective that the broad policies that underlie 25 U.S.C. § 398c should be judged. *White Mountain, supra,* .... U.S. ...., 65 L.Ed.2d 665, 672-73, 100 S.Ct. 2578, 2583-84 (1980).

The original bill as passed by the Senate during the 1924 Session provided that the Indians would receive all of the royalties from gas and oil leases on Executive Order Reservations.[41] After numerous amendments attempting to divide the royalties and taxes equitably among the tribes, the states and the federal government,[42] the joint conferees agreed to give the Indians 62.5% and the states 37.5% of the royalty. In defending the conference committee report, Representative Hayden articulated the rationale for granting the states taxation power:

> Each House had previously agreed that a share of the benefit to come from the development of oil, gas, and other minerals on unallotted Indian lands within Executive order Indian reservations should go to the State. Whether the State should have the right to directly collect a tax or whether a share of the rental or royalty should be paid in lieu of the tax was the issue the conference had before

[40] *See,* Seth Dissent, (J.A. 170) and Executive Orders, (A.P.C. 116).

[41] 66 Cong. Rec. 999 (1924).

[42] 66 Cong. Rec. 2234, 2799 (1925).

them, and they had jurisdiction to determine that question. 66 Cong. Rec. 5433 (1925).[43]

In 1926, a bill giving all royalties to the tribe was passed by both the House and Senate but vetoed by the President.[44] The eventual compromise passed and signed by the President in 1927 allowed the states to tax all the oil and gas produced, but awarded the tribes the right to all royalties.

It is clear that in passing this legislation, there was substantial sentiment in Congress that although Indians are entitled to their treaty reservations, the Executive Order reservations were a gift from the Executive Branch at the expense of the states wherein they were located.[45] Several statements of Congressional leaders illustrate that a prime goal of the legislation was to allow the states to retain adequate revenue bases even though large percentages of their territories were occupied by federal enclaves.[46] The bill finally adopted reached a compromise by giving the Indians the exclusive royalty rights and the states the exclusive right of taxation.

Congress did not intend that the states should be deprived of their royalty rights and also have to share the right to tax with the Indians. *See,* Barrett Dissent, (J.A. 186). Indeed, it is clear that no one involved believed Indian tribes had any power to levy a severance tax. Commissioner of Indian Affairs Charles Burke pointed out that unless the tribes were given a share of the royalties, they would not receive any benefit from these

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[43] In spite of Congressman Hayden's defense, the Bill was defeated in the 1925 Session on a point of order. 66 Cong. Rec. 5433-34 (1925).

[44] 67 Cong. Rec. 10912, 11397 (1926), S.Doc.No. 156, 69th Cong. 1st Sess. (1926).

[45] 67 Cong. Rec. 10915, 10995 (1926); 68 Cong. Rec. 4569 *et seq.* (1927).

[46] *See,* Conf. H. R. No. 1637, 68th Cong. (March 3, 1925); 68 Cong. Rec. 10912-19 (1926); 68 Cong. Rec. 11391 (1926); Remarks of Congressman Morrow, 68 Cong. Rec. 4703 (1927).

leases.[47] A more recent Congressional study also recognized that Indians have traditionally been limited to royalties, and, implicitly, that 25 U.S.C. § 398c would have to be repealed to allow tribal severance taxes.[48]

If Congress had intended to permit both the states and the tribes to benefit from taxation of oil and gas revenues, it would have so provided in explicit terms. Earlier legislation demonstrates that Congress knew how to permit the Secretary of the Interior to collect taxes on behalf of the Indian tribes when it so intended. For example, 25 U.S.C. § 319 provides for rights-of-way through Indian reservations for telephone and telegraph lines. This statute, enacted in 1904, also allows the Secretary of the Interior to impose taxes for the benefit of the Indians, but only when such rights of way "are not subject to state or territorial taxation." *See also,* 25 U.S.C. § 321.

These statutes demonstrate Congress knew that the tribes had no inherent powers of taxation over non-Indians granted access to the reservation, but that such powers must be expressly granted by Congress and exercised not by the tribes but by the Secretary for their benefit. It also illustrates how solicitious of the state tax base, *vis-a-vis* Indian reservations, the Congress was during this period.

In the case of oil and gas production from these Executive Order lands, Congress has never permitted a tax to be collected for the tribes. The State of New Mexico, moreover, has vigorously asserted its taxing authority over this same oil and gas to the exclusion of any additional tribal tax. Congressional sanction of further erosion of the state tax base seems especially unlikely since Congress recognized obligations of the states to

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[47] Hearings before Subcommittee of the Committee on Indian Affairs on H.R. 9133, 69 Cong. 1st Sess., pp. 20-25, 45 (February 19, 1926).

[48] *Final Report of the American Indian Policy Review Commission,* pp. 181, 344 (1977).

provide Indian reservations with vital governmental services during this same period.[49]

Even if 25 U.S.C. § 398c did not preempt tribal taxation, however, the Secretary of the Interior specifically approved each of Petitioners' leases. The fact that the Secretary has approved these leases is significant for, pursuant to 25 U.S.C. § 396d, the Secretary has adopted a federal regulatory scheme, codified in 25 C.F.R. Part 171 and 30 C.F.R. Part 221, so pervasive as to preclude any additional burdens by the tribe. The Secretary, under that scheme, is specifically prohibited from approving any regulation which would unilaterally increase the rate of rental or royalty.[50]

In a similar factual context, this Court recently held that no additional tax burden could be imposed on tribal timber lessees because the federal regulations were so pervasive. *White Mountain Apache Tribe* v. *Bracker*, . . U.S. . . , 65 L. Ed.2d 665, 100 S.Ct. 2578 (1980), held that Arizona could not impose its motor carrier license tax and fuel use taxes on a non-Indian

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[49] *See, e.g.,* 66 Cong. Rec. 2799 (1925); Hearings of the Subcommittee of the Committee on Indian Affairs on HR. 9133, 69th Cong. 1st Sess., pp. 11-14, 17, 20 (February 19, 1926); 25 U.S.C. § 231, § 452.

[50] Paragraph 3(g) of Petitioners' leases tracks 25 C.F.R. § 171.28 which contains the following proviso:

> Provided, that no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease. All former regulations governing the leasing of tribal lands for mining purposes are superceded by regulations in this part.

By approving the Jicarilla severance tax, the Secretary has, in effect, approved a regulation increasing the royalties to the tribe. (R. 70-1). The Court of Appeals, however, refused to consider this issue since it found the tribal tax valid. (J.A.161) Under this logic, the Secretary could avoid his legal and contractual obligations under the guise of merely approving tribal actions rather than affirmatively doing the prohibited act himself.

corporation approved by the Secretary of the Interior and operating under a federally recognized timber contract. After pointing out that timber on reservation land is owned by the United States for the benefit of the tribe and cannot be harvested without Congressional consent, the Court went on to note that the tribal timber company contracted with the United States to harvest timber, "pursuant to regulations of the Bureau of Indian Affairs." . . U.S. . . , 65 L.Ed.2d at 670, 100 S.Ct. at 2581, and that such activities were "subject to extensive federal control." *Ibid.* The Court further noted that all contracts for reservation logging required the express approval of the Secretary of the Interior. The majority in *White Mountain*, therefore, concluded that the federal regulation of logging on Indian reservations was so pervasive as to be preemptive of further tax burdens. In reaching this conclusion the Court recognized that the scope of federal preemption is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty." . . U.S. . . , 65L.Ed 2d at 673, 100 S.Ct. at 2584. Speaking for the Court, Justice Marshall concluded:

> The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors. . . U.S. . . , 65 L.Ed.2d at 676, 100 S.Ct. at 2587.

In a companion case, *Central Machinery Co.* v. *Arizona State Tax Commission*, . . U.S. . . . , 65 L.Ed.2d 684, 100 S.Ct., 2592 (1980), this Court again found federal preemption of additional tax burdens on federally approved contracts with an Indian tribe. In that case, Central Machinery, a non-Indian enterprise, sold eleven tractors to the Gila River Indian Tribe. Arizona attempted to impose its transaction privilege tax on the gross receipts of that sale. As in *White Mountain, supra*, this Court detailed the facts leading to its conclusion that, "the Federal

Government has comprehensively regulated trade with Indians." . . U.S. . . , 65 L.Ed.2d at 688, 100 S.Ct. at 2595. It concluded that "It is the existence of the Indian trader statutes, then, and not their administration, that pre-exempts the field of transactions with Indians occurring on reservations." . . U.S. . . , 65 L.Ed.2d at 689, 100 S.Ct. at 2595-6.

The Secretarial supervision of Petitioners through the United States Geological Survey and the Bureau of Indian Affairs is no less pervasive as to oil and gas than it was found to be in *White Mountain* with regard to timber. Under 25 C.F.R. Part 171 and 30 C.F.R. Part 221 every facet of Petitioners' operations are dictated, regulated, supervised, and monitored by Federal authorities. Indeed this regulation is far more pervasive than that found to preempt totally the field of trading with the Indians in *Central Machinery.* Petitioners respectfully submit, therefore, that the Jicarilla tax adds an additional burden not contemplated by the Federal regulations and expressly prohibited to the Secretary himself.

POINT IV

IF INDIAN TRIBES HAVE THE INHERENT GOVERNMENTAL POWER TO IMPOSE TAXES ON NON-INDIANS, NON-INDIAN CITIZENS ARE ENTITLED TO THE BENEFIT OF CONSTITUTIONAL PROTECTIONS AGAINST ABUSES OF TRIBAL GOVERNMENTAL AUTHORITY

The resolution of tribal authority over non-Indians has serious practical and Constitutional consequences.[51] Many Indian advocates and lower courts have stated[52] that tribal actions are

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[51] *Oliphant,* v. *Suquamish Indian Tribe,* 435 U.S. 191, 210 (1978); *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408, 412 (9th Cir. 1976).

[52] *See, e.g.* Note, 1979 Wash.U.L.Q. 879, 905; Johnson and Crystal, *Indians and Equal Protection,* 54 Wash. L.R. 587, 617 (1979), *United*

not subject to those constraints of the United States Constitution which are designed to protect the people from abuses of governmental authority. In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978), for example, this Court recognized:

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. 436 U.S. at 56.

The facts involved, and language employed, in *Santa Clara* emphasize that the lack of Constitutional inhibitions on tribal government applies only, however, when the tribe is dealing with its own members in areas traditionally regulated by Indian custom. A careful review of the opinion in *Santa Clara* leads to the conclusion that this Court recognized that Constitutional restraints upon tribal government were not necessary because tribal government has authority only on internal matters traditionally governed by Indian practices and customs. 436 U.S. at 55-56.

Given this Court's holdings that Indian tribes are not constrained by the Constitution, two alternatives exist: (1) either such tribes cannot have authority over non-Indians; or (2) non-Indian citizens can be totally deprived of their Constitutional rights by Indian tribes.[51]

Logic dictates that since tribal customs and traditions differ from the Anglo-American concept of jurisprudence, the United States Constitution need not be injected into the relationship

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States v. *Karlen,* 476. F. Supp. 306 (D.S.D. 1979); see also cases cited by this Court in *Santa Clara, supra,* 436 U.S. at 56, n. 7.

[51] The ambivalence of the Tenth Circuit over this dilemma can be seen in its opinion which found the Due Process clauses of the Fifth and Fourteenth Amendments embodied a "national, if not sovereign interest" but failed to deal with Petitioners' other Constitutional claims, including the Equal Protection challenges.

between tribal members and their government.[54] By attempting to assert independent jurisdiction over non-Indians, however, tribal government calls into serious question the *raison d'etre* of tribal sovereignty itself. Moreover, by seeking to extend jurisdiction to non-Indians, the tribes ignore the substantial changes in their status and circumstances which have transpired since the decision in *Worcester* v. *Georgia*.[55] To indulge governmental sovereignty by Indian tribes would effectively create foreign enclaves within the States. Moreover, these enclaves would be curiously populated, and in fact governed, by a privileged class of American citizens who may accept the benefits, without the burdens, of such citizenship. Perhaps even more remarkably, these enclaves would be governed by tribes unconstrained by the fundamental precepts of American law and thereby free to exploit, expropriate, and expel other Americans as they see fit unless the Constitution limits their actions and "infringes on their right to make their own laws and rule others by them." [56]

An extension of tribal sovereignty to non-Indians would not serve the religious, cultural, and historical purposes of "tribal sovereignty." To the contrary, by extending tribal sovereignty to encompass affirmative jurisdiction over non-Indians, tribes are given an open invitation to discriminate, on an organized governmental level, against American citizens precisely because

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[54] *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971); *Howlett* v. *Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976); *White Eagle* v. *One Feather*, 478 F.2d 1311 (8th Cir. 1973).

[55] 31 U.S. (6 Pet.) 515 (1832). *See also, Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72 (1962); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 171-2 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973).

[56] This is a paraphrase of the test laid down in *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), wherein the Court used the infringement test for a defensive purpose to prevent encroachment of State jurisdiction over transactions directly involving tribal members and extensively regulated by the federal government.

of race and national origin. No interest in cultural identity can excuse the Draconian consequences for the remainder of society.

Today any tribal jurisdiction over non-Indians seems unthinkable without a corollary right of general participation for non-Indians in tribal government. No Constitutional value is more central to our notion of political justice than that subjection to governmental power presupposes the right to petition and participate in that government on an equal basis. Indeed this Court has very recently reiterated that, "In this Nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall,* 440 U.S. 410, 426, reh. den. 441 U.S. 917 (1979). Participation in the election, deliberations and proceedings of Indian tribal councils is, however, denied non-Indians. Once tribal government asserts sovereign governmental powers over non-Indians, the most pivotal values in American democracy are imperiled.[57]

The views of Congressman Meeds in his dissent to the Final Report of the American Indian Policy Review Commission, which were approvingly quoted by this Court in *Oliphant,* 435 U.S. at 205, n.15, amplify the same principle:

> There are few values more central to our society than the belief that governments derive 'their just powers from the consent of the governed.' Government by Indian tribes over non-Indians, if allowed to take place, would be a clear exception to that principle. A heavy burden of justification should fall on those who would subject some of our citizens

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[57] This Court has frequently recognized equal franchise is necessary for those substantially affected by governmental action. *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Avery* v. *Midland County,* 390 U.S. 474 (1968). To make a non-Indian completely subject to tribal government within the reservation enclave when he is completely disenfranchised by the tribe would violate the Constitutional concept of equal protection. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970). To the extent that this disenfranchisement cannot be remedied because of the non-Indians' racial status, it is even more suspect. *Terry* v. *Adams,* 345 U.S. 461, reh. den. 345 U.S. 1003 (1953).

> to the coercive powers of others without any opportunity or right to join in the deliberations and decisions which determine how that power is to be exercised. Those who assert that Indian tribes should be allowed to rule non-Indians offer little justification other than an appeal to the abstraction of 'sovereignty.' But our society sees no distinction between the rulers and the ruled; all citizens enjoy both statuses. There is little reason shown why academic deductions from the metaphor of 'sovereignty' should take precedence over the Declaration of Independence and the first principles of democracy.
>
> Consequently, it is all the more inappropriate that Indian tribes should exert governmental power over resident non-Indians who plainly would be entitled to vote and participate in tribal government were it not for the accident of their race.

The decision of the Court of Appeals below would subject non-Indians to just such tribal governmental power without allowing them any right to petition or participate. Chief Judge Seth, in dissent, clearly recognized this flaw in the majority reasoning, saying:

> The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundations of governmental authority as it exists in the United States. (J.A. 169).

Judge Seth also observed governmental "sovereign power" should not be attributed to Indian tribes, precisely because of their failure to allow non-members to participate:

> The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is how it should be for self-determination; however, such a group of tribal members excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on

representation with an opportunity to participate. When this is provided, authority exists to govern. (J.A. 170-71).

To hold that non-Indians lose their Constitutional rights merely by entering an Indian reservation contravenes the long established principle that the Constitution is binding on all within the territory of the United States, and does not contemplate such exempt enclaves. *Southern R. Co.* v. *Greene,* 216 U.S. 400, 412 (1910); *cf., Healy* v. *James,* 408 U.S. 169, 180 (1972). As this Court noted in *Colville, supra,* .... U.S. ...., 65 L.Ed.2d at 20, 100 S.Ct. at 2073, the intricate problem of state and Indian taxation jurisdiction is a "vexing area" in which the interests of state and federal governments as well as the tribes have to be analyzed. To hold that Indian tribes may govern non-Indians without regard to Constitutional guarantees would infringe upon the legitimate interests of both state and federal governments. *Washington* v. *Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 502, *reh. den.* 440 U.S. 940 (1979); *cf.,* Grant, *The Scope and Nature of Concurrent Power,* 34 Colum.L.R. 995, 1000-02 (1934).

If Indian tribes are to be given general governmental authority over non-Indians, they must be subject to all the limits on governmental authority provided for in the Constitution. Without Constitutional restraint, tribal action could expropriate property worth hundreds of millions of dollars and banish non-Indian citizens rightfully on reservations under federal authority. When the enforcement of tribal taxation involves the banishment of non-Indians from the reservation, cancellation of their leases and seizure of their property, tribes would be exercising criminal jurisdiction forbidden them.[58]

Even if such harsh sanctions are prohibited to the tribes, any procedure which allows a government to impose the full panoply of taxation against those of a different culture and race,

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[58] *Oliphant, supra; Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976); *Crabtree* v. *Madden,* 54 F. 426, 431 (8th Cir. 1893).

without any avenue for the latter to protect themselves from, or participate in, the decision seems unthinkable. In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 210 (1978) this Court relied upon its earlier decision in *Ex parte Crow Dog,* 109 U.S. 556 (1883). The Court's observations in the earlier case as to why it would be inappropriate to construct coercive non-Indian jurisdiction over Indians applies equally well to the converse situation herein. The Court found that jurisdiction, in the absence of a narrowly defined Congressional authorization, would be inappropriate since it would submit Indian offenders to judgment "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . " *Ex parte Crow Dog, supra,* at 571.

Extra-constitutional powers of tribal taxation over non-Indians lawfully present on the reservation would create the same inequities recognized in *Crow Dog* and unfettered tribal power over non-Indians would not advance any legitimate goal of Indian self-government. To allow non-Indians equal participation in tribal government, on the other hand, would completely frustrate the legitimate purpose of tribal sovereignty by destroying cultural identity and Indian traditions.

POINT V

THE JICARILLA TAX VIOLATES THE COMMERCE CLAUSE

Approximately 80% of the oil and gas produced from the Jicarilla Apache Reservation immediately enters interstate commerce. (J.A. 129). Indeed, even prior to the time it is produced, much of this oil and gas is committed under long-

term contracts to interstate markets and regulated by Federal agencies.[59]

The Court of Appeals in dealing with the Commerce Clause in this case again demonstrated the difficulty inherent in attributing governmental power to Indian tribes without express Constitutional limitations. In struggling to apply the Constitutional standard designed for the federal and state governments to Indian tribes, the majority said:

> It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. (J.A. 153).

It is true that no court has specifically analyzed how tribes are limited in their taxing power by the Commerce Clause. Congressional power over Indian commerce, however, is at least as great as its power over commerce "among the several states."[60] Indeed a strong argument can be made that the power of Congress "to regulate Commerce . . . with the Indian tribes" is greater than its power to regulate commerce among the several states because the former is not subject to federalism and state sovereignty limitations. *See, National League of Cities* v. *Usery,* 426 U.S. 833 (1976); *cf., Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). Although at one time this Court had adopted a fairly restrictive view of Congressional power over Indian Commerce, *Matter of Heff,* 197 U.S. 488 (1905), more recent decisions have upheld Congressional regulation which bears some reasonable relationship to that power. *United States* v. *Nice,* 241 U.S. 591 (1916), overruling *Heff, supra; cf., United States* v. *Mazurie,* 419 U.S. 544 (1975). Federal regulation, pursuant to

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[59] R. 55-57; 72-6, 209-210; Pl. Ex. AM-1, R. 228-9. *See also, Jicarilla Apache Tribe* v. *Supron Energy Corp.,* 479 F.Supp. 536, 542-4 (D.N.M. 1979).

[60] *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U.S. 617, 620 (1903); *U.S.* v. *Seveloff,* 27 F.Cas. 1021, 1024 (D.Ore. 1872). (No. 16, 252).

Congressional authorization, of the production of oil and gas from Indian reservations therefore preempts local regulation.

Moreover, the Commerce Clause, of its own force, restrains local burdens on the stream of interstate commerce.[61] If such local governments could tax oil and gas beyond their boundaries they could subject interstate commerce to intolerable burdens.[62]

Indian tribes should not be allowed to impose burdens on interstate commerce which are prohibited to the states. The Court of Appeals for the Eighth Circuit considered the effect of this Constitutional limitation upon a tribal ordinance in *Muskogee National Telephone Co.* v. *Hall,* 118 F.382 (8th Cir. 1902). In the *Muskogee* case, the Creek Nation granted Muskogee Telephone an exclusive franchise to construct and operate a telephone system within the Creek Nation. Judge Thayer, speaking for a unanimous Court, said:

> But, be this as it may, telephone companies, like telegraph companies, are important agencies in the transaction of interstate commerce, and no state can grant to one telephone company the exclusive right to operate telephone lines within it borders; and what a state cannot do, because it operates as an obstruction to the free flow of interstate commerce, the Creek Nation (which is said to embrace as much territory as some of the states) cannot do. (118 F. at 384-5).

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[61] *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U. S. 298 (1924); *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell,* 424 U. S. 366 (1976); *cf., National Bellas Hess, Inc.,* v. *Department of Revenue,* 386 U.S. 753 (1967).

[62] *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954); *Eastern Gulf Oil Co.* v. *Kentucky State Tax Commission,* 17 F.2d 394 (E.D.Ky. 1926).

The State of New Mexico collects at least four separate taxes on the severance of this same oil and gas.[63] The Jicarilla tax would, therefore, also place a multiple burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

The Court of Appeals opinion recognizes that New Mexico imposes severance taxes upon the same oil and gas to which the Jicarilla severance tax would apply. (J.A. 155). The majority, however, dismissed the multiple burden argument by reasoning:

> It is beyond question that no state, *with the exception of New Mexico,* has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support a levy of a severance tax on lessees' occupation. *There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause.* That New Mexico may be able to impose an identical tax on leases does not implicate federal interest in maintaining the flow of interstate commerce at all, we believe. (J.A. 156). (emphasis added).

The Court of Appeals thus ignored the Constitutional proscription against multiple burdens upon interstate commerce. If, as the majority and concurring opinions hold, an Indian tribe is indeed analogous in governmental power even to a local government, then it is clear that tribal taxation must be subject to dual Commerce Clause scrutiny. *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951). Taxation of a single event by more than one government works to the advantage of local commerce because local commerce cannot be so frequently taxed. *Central R. Co.* v. *Pennsylvania,* 370 U.S. 607 (1962).

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[63] (J.A. 129), New Mexico imposes up to six oil and gas severance taxes on some of this oil and gas. (R. 57). If valid, the Jicarilla tax combined with the State severance taxes would create a total tax burden of more than 29% of the price of old gas and over 12.5% of the price of old oil. (J.A. 130).

Since the Jicarilla tax, by its terms, applies only to gas "sold or transported off the reservation," its effect is to subject gas moving off the reservation to multiple taxation to which gas remaining on the reservation is not exposed. This form of discriminatory multiple taxation is prohibited by the Commerce Clause. *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938); *Standard Oil Co.* v. *Peck,* 342 U.S. 382, 385 (1952). A tax which exempts local goods or events while taxing interstate transactions is therefore invalid.[64]

If, as the Court of Appeals held, the Jicarilla tax is levied on the incident of severance of the oil and gas from the Reservation, then it constitutes an impermissible burden upon interstate commerce because New Mexico taxes the same "local" event. The Court of Appeals dismissed this burden since only two entities would impose taxes on the single event of severing oil and gas. This highlights the pernicious effect of the majority's holding, which creates impermissible governmental enclaves within the territorial boundaries of the existing states. The creation of these "local" governments within the existing states, but not subject to their jurisdiction, would allow "local taxes" by both tribal and state governments.[65] The majority opinion below creates a unique legal situation where several totally autonomous sovereign governments exist within the borders of a State of the Union and all can tax without coordination or restriction, at least until the combined level reaches

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[64] *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318 (1977); *West Point Wholesale Grocery Co.* v. *City of Opelika,,* 354 U.S. 390 (1957); *Darnall & Son Co.* v. *Memphis,* 208 U.S. 113 (1908).

[65] The problem may be illustrated by the fact that California alone has 66 Indian reservations within its borders. Arizona's mere 17 reservations occupy territory larger than 13 of the States, and cover one-third of Arizona's 114,000 square miles. Federal and State Indian Reservation and Indian Trust Areas, U.S. Department of Commerce (1974).

confiscation. Such widespread establishment of Indian taxation would effectively destroy existing State taxation.[66]

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals for the Tenth Circuit should be reversed, and the Jicarilla Apache Tribe severance tax ordinance should be declared unlawful and void.

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[66] The Court of Appeals pointed out that after the present case was tried but while it was on appeal, this Court altered the standard for measuring the impact of a regulation on interstate commerce in *Department of Revenue* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978). The Court of Appeals refused to consider whether the tribal tax was fairly apportioned or to remand for any evidence on this point. (J.A. 154).